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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DWAYNE CHAMBERS,

Defendant and Appellant.

E047071

(Super.Ct.No. FSB050629)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Anthony Dwayne Chambers appeals his jury conviction for second degree murder. (Pen. Code, § 187, subd. (a).)¹ He claims there was insufficient evidence to support the jury's true findings on the gun enhancements. (§ 12022.53, subds. (c) & (d).) He also contends the trial court abused its discretion by denying his motion to strike a prior conviction.

FACTUAL AND PROCEDURAL BACKGROUND

The victim in this case was a close friend of defendant. She died from a single gunshot wound that entered her left cheek and lodged in the back of her brain. According to the coroner, it is likely she died almost instantly. The trajectory of the bullet indicated the victim was shot from a level position from more than two and a half to three feet away.

Defendant lived in Richmond near San Francisco but was visiting friends in San Bernardino. On the evening of May 21, 2005, defendant and the victim went to a party in an apartment together with friends and relatives. S.W., a 16-year-old girl who was at the party, testified she was talking to defendant when she noticed he was playing with a black revolver. She said he pulled bullets out of his pocket, pointed the gun near her feet, and pulled the trigger once or twice. The gun clicked but did not fire. She was upset and told him not to do that again. Defendant apologized. Defendant's former girlfriend, who was also at the party, said she saw defendant with the gun that night. She also said defendant had a habit of playing around with guns from time to time and/or when he was drinking.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

An hour or so after defendant pointed the gun near S.W.'s feet, S.W. and at least one other witness saw defendant and the victim laughing and talking while sitting outside on the steps. At that time, defendant was also playing around with the gun. He and the victim were joking about guns and bullets. S.W. and others heard a gun fire and saw the victim slumped over. The victim's face was covered with blood, and she looked shocked. Defendant was seen apologizing and trying to revive her.

During direct examination, S.W. said she only saw smoke when the gun fired. However, the record indicates this was inconsistent with prior statements she made to police. In a recorded interview, S.W. told police she saw defendant point the gun at the victim and fire. A recording and transcript of the interview were both admitted into evidence. When confronted with her prior inconsistent statements during trial, S.W. said her words must have been misinterpreted.

Police arrived at the scene about 2:00 a.m., and the victim's body was lying on the sidewalk. No one else was around. Defendant ran up to the victim and told one of the officers she was his wife. He was crying and his shirt was covered with blood. When questioned by the officer, defendant said a black compact car drove up, someone got out of the car and fired a gun one time in their direction. Defendant told the officer he ran away and thought the victim was behind him. At the police station soon after the shooting, defendant was interviewed by a different detective. Defendant told the second detective a different story. He said he was inside the apartment and was not present when the victim was shot. When he was arrested about five weeks after the shooting, he told the detective he was in front of the apartment when the victim was shot.

Defendant testified at trial in his own defense. He said he and the victim were friends and did not have any disagreements or arguments on the day of the shooting. He admitted having a gun with him at the party. He said he left the gun in the victim's car earlier that day, and she brought the gun back to him at the party about 10:30 p.m. He tucked the gun into the side of his sweatpants at his waist, but then he took it out because it was causing his pants to fall down and the victim was telling him to pull his pants up. Defendant testified that he opened the barrel, turned the gun upside down, emptied the bullets out, and put the bullets in his pocket. While he was doing this, he was standing up and the victim was sitting in front of him on a wall about six feet away. After removing the bullets, he claims the gun "dropped" and "went off."

At first, defendant said he did not realize the bullet actually hit the victim, but she fell over. He put her on his lap, tried to stop the bleeding, and asked for help. Defendant denied intentionally pointing or shooting the gun at the victim and was not really sure how the gun fired. He thought he had taken all the bullets out of the gun. Defendant also admitted lying to the responding officer and to the detective. During cross-examination, defendant told the prosecutor he had the gun for a couple of months prior to the shooting.

Defendant was charged in count 1 with second degree murder (§ 187, subd. (a)) and in count 2 with being a felon in possession of a firearm (§ 12021, subd. (a)(1)). It was further alleged defendant personally used and intentionally discharged a handgun proximately causing the victim's death. (§ 12022.53, subds. (a)-(d).) One prior strike conviction was also alleged in the amended information. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

Prior to trial, defendant pled guilty to count 2, being a felon in possession of a firearm, so the jury would not be told about the prior conviction. The jury found defendant guilty of second degree murder (count 1) and also found the firearm allegations to be true. In a bifurcated proceeding, the court found the strike allegation to be true.

The trial court sentenced defendant to a determinate term of four years in state prison on count 2 and to an additional, consecutive term of 55 years to life on count 1. To reach the total term, the trial court imposed the middle term of two years on count 2 and doubled it to four years as a result of the prior strike. On count 1, the court imposed 15 years to life, doubled to 30 years to life as a result of the strike. The court then added a term of 25 years to life for personally and intentionally discharging a firearm causing death. (§ 12022.53, subd. (d).) The remaining gun enhancements were stayed. (§§ 12022.53, subds. (b) & (c), 12022.5 (a).)

DISCUSSION

Sufficiency of the Evidence

Defendant concedes there is enough evidence in the record to support the jury's finding that he personally used a firearm within the meaning of subdivision (b) of section 12022.53. However, he argues there is insufficient evidence to support the jury's finding that he intentionally discharged a firearm within the meaning of subdivisions (c) and (d) of section 12022.53. As a result, he contends the true findings on section 12022.53, subdivisions (c) and (d), should be reversed and dismissed, and he should be resentenced so that only a 10-year enhancement under section 12022.53, subdivision (b), is imposed.

“We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.]” (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058.) “In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) “In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Section 12022.53 imposes “three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies.” (*People v. Martinez* (1999) 76 Cal.App.4th 489, 495.) Subdivision (b) of section 12022.53 requires a 10-year enhancement for a defendant who “personally uses a firearm,” which includes intentionally displaying a gun in a menacing manner, firing it, or striking or hitting someone with a gun. (*People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319-1321.) Subdivision (c) of section 12022.53 requires a 20-year enhancement for “any person who, in the commission of a felony . . . personally and intentionally discharges a firearm. . . .” Finally, subdivision (d) of section 12022.53 provides for an

enhancement of 25 years to life and applies to “any person who, in the commission of a felony . . . personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death” Based on a jury’s true findings, a trial court imposes punishment for the firearm enhancement with the longest term of imprisonment, and the remaining firearm enhancements that were found true for the same crime must be imposed and then stayed. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1123.)

As defendant contends, “an honest belief that a gun is empty negatives the mental state of an intent to fire the gun.” (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1440.) Because he testified he thought the gun was empty, and there is no testimony to contradict this assertion, he argues the jury could not reasonably conclude he knew the gun was still loaded when it fired. As a result, the jury also could not reasonably conclude he intentionally discharged the gun within the meaning of section 12022.53, subdivisions (c) and (d). At most, defendant believes the jury could conclude he used the gun within the meaning of subdivision (b) of section 12022.53 by carelessly failing to remove all of the bullets and then recklessly playing with the gun by intentionally clicking on the trigger. We disagree.

Defendant’s argument is unconvincing because it assumes the jury was required to believe his testimony that he thought the gun was empty and that he did not intentionally point the gun at the victim or pull the trigger. Particularly given the extent to which defendant’s credibility was called into question during the course of the trial, the jury was entitled to disbelieve defendant’s self-serving statements. Defendant’s credibility was discredited in a number of ways. First, the evidence indicates defendant told police

several different stories prior to trial as to what happened the night of the shooting, and he then told an entirely new and different story when he testified. Second, defendant admitted lying to police when he was interviewed. Third, defendant was impeached with a prior conviction for narcotics possession in 1993. Fourth, S.W. testified defendant pulled “a lot” of loose bullets out of his pocket right before he pointed the gun towards her feet and pulled the trigger. According to S.W., this incident occurred an hour or so before the victim was shot. This conflicts with defendant’s testimony that the gun went off accidentally and hit the victim as he was closing the barrel immediately after he emptied the bullets out of the gun.

Most importantly, defendant’s self-serving statements were in conflict with other significant evidence. S.W. told police several times in a recorded interview that she saw defendant point the gun at the victim and fire. This is strong evidence that the shooting was intentional rather than accidental. Based on S.W.’s testimony and defendant’s lack of credibility, the jury could also reasonably infer defendant knew the gun was loaded when he fired it, and his conflicting stories to the police were simply attempts to cover up the nonaccidental nature of the shooting. Although S.W. later testified she only saw smoke at the time the gun fired and hit the victim, the jury could reasonably believe her prior statements were more credible because they were closer in time to the shooting incident.

In sum, based on S.W.’s testimony and the attacks to defendant’s credibility, the jury could reasonably infer defendant intentionally discharged the gun within the

meaning of section 12022.53, subdivisions (c) and (d). As a result, there is sufficient evidence to support the jury's true findings on these gun enhancements.

Motion to Strike a Prior Conviction

Defendant contends the trial court abused its discretion by denying his motion to strike his juvenile conviction for robbery and vehicle theft so he could avoid being sentenced under the "Three Strikes" law. According to defendant, the trial court should have granted his motion based on the age of the prior qualifying conviction, his relatively minor criminal history as an adult, his efforts to improve himself, as well as his record of employment and specialized training, and his apology to the victim's family.

A trial court's denial of a motion to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*)). "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) A trial court deciding whether to dismiss a prior strike conviction in furtherance of justice pursuant to section 1385, subdivision (a), "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Defendant has the burden of demonstrating an abuse of discretion, and in the absence of such a showing, we presume the trial court acted correctly. (*Carmony, supra*, 33 Cal.4th at pp. 376-377.) There is a “ ‘strong presumption’ [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation.” (*In re Large* (2007) 41 Cal.4th 538, 551.) The circumstances must be “extraordinary” for a career criminal to be deemed to fall outside the scheme of the Three Strikes law. (*Carmony, supra*, 33 Cal.4th at p. 378.) A decision to strike a prior conviction remote in time is an abuse of discretion where the defendant has not led a crime-free existence since the time of his last conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

On October 2, 2008, the trial court held a hearing on defendant’s motion to strike. Based on all of the relevant information before it, the trial court concluded this was not an appropriate case for “an extraordinary exercise [of] discretion.” In reaching its decision, the trial court stated it relied in large part on the probation report, as well as notes from the trial testimony. In our view, the record supports the trial court’s conclusion defendant’s present offense, prior criminal history, background, character, and prospects did not justify sentencing him “outside the Three Strikes law.” The balance of factors simply does not favor striking defendant’s prior qualifying conviction.

Defendant committed the qualifying strike offense on June 21, 1985, when he was 16 years old. Defense counsel argued it was appropriate to strike the conviction because “it is extremely old, almost 23 years old.” In opposition, the prosecutor emphasized two points—the seriousness of the circumstances of the strike offense as set forth in the

probation report, as well as defendant's continued criminal behavior over the next 13 years or so after he was released from the California Youth Authority. The prosecutor did acknowledge defendant had not had a criminal conviction for the five or six years preceding the murder, but argued this was "largely irrelevant" given his lengthy prior history and the fact that he was a felon in possession of a gun when the murder occurred.

In reaching its decision to deny defendant's motion, the court noted that defendant's criminal history began a very long time ago, in 1985, with a serious and violent juvenile conviction for robbery and vehicle theft which qualified as a strike. Although the court acknowledged the age of the strike conviction, it noted defendant had not, for the most part, lived a crime-free life since that time. According to the probation report, he was paroled from the California Youth Authority in 1988 but was returned in March 1989 for a parole violation. As an adult, he was convicted of petty theft in July 1991 and possession of a controlled substance for sale in March 1993. He then violated his parole in the drug case when he was arrested for an incident involving domestic violence. After being released on parole again in December 1997, he was arrested for battery.

Emphasizing the violent nature of the current and prior strike offense, the court concluded there was nothing in the record "that would lead the court to conclude that there is anything in the background character or potential prospects of [defendant] that would indicate a turnaround from the previous conduct that I recited." We note also that defendant admitted during his trial testimony that he obtained the gun a couple months prior to the shooting. He did so even though he was forbidden to possess a gun because

of his status as a felon, and this is but one more indication defendant was not committed to a life free of crime. Under these circumstances, we cannot disagree with the trial court's decision that defendant's motion should be denied because he cannot be deemed to fall outside the Three Strikes law.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.